Supreme Court of the United States.

OCTOBER TERM, 1903.

(Term No. 13.)

ROBERT R. WRIGHT, JR., AS MAYOR OF THE CITY OF DENVER, PLAINTIFF IN ERROR,

vs.

ELLEN TERESA MORGAN ET AL.

Brief and Argument of Plaintiff in Error in Reply.

I.

The principal error of which we complain goes back of the second opinion of the Court of Appeals to the first opinion of that court.

It is involved in the ruling that the act of Congress and the patent conveyed an absolute title to the mayor; that the statute of uses operated to transfer his title to the city, and that the deed of the city and its grantees operated to vest the title in private individuals, and to divest the public of any interest in the land in controversy.

We contend, as we have contended from the beginning, that the purpose of the act of 1872 was to create and perpetuate a public beneficial use in these lands; to that end to transfer the legal title to a designated municipal officer

of eminent character in his representative capacity; to impress the title in his hands with a public trust, so that his title and the beneficial use could never be alienated or lost.

We urge such a construction of the act as will accomplish this purpose, while the decisions of the Court of Appeals most effectually defeat it.

In the first opinion the court announced that "the act of Congress of May 21, 1872, * * * did not operate to annex any condition to the grant so authorized." And the opinion declares that—

"In this case, although the use to which it was expected the land would be put is mentioned, it is rather as an explanation of the reason for permitting such an unusual entry of the land by a municipal corporation, than for any other purpose. There are no words restricting the use to that mentioned, nor providing for forfeiture in case the land is put to other use. The patent by which the title to this land was conveyed vested the land absolutely in fee, and without the mention of any use whatever."

We think this view of the Court of Appeals is based upon an erroneous conception of the purpose and effect of the act of 1872. The terms which Congress employed and which were intended to limit the estate are assigned the rank of a mere expression of the "expectation" of Congress, with an implication that if the expectation is not realized it will make no difference.

It is unmistakable that "Congress has plenary power to prescribe the nature of the title that may be acquired in any public lands and to prescribe the procedure by which such title may be acquired." Fee *vs.* Brown, 17 Colorado, 510, (p. 519.)

"It may donate the land or it may exact different prices and affix different conditions, in connection with the acquisition of the title to different tracts. It may repeal, extend

or limit previous enactments at will, provided prior vested rights are not injuriously affected." (*Ibid.*)

In saying that these words afford a mere "explanation of the reason" for the passage of the act, the court virtually holds that the words employed, which, we contend, were used in order to authorize the conveyance of a limited estate, did in fact create an unqualified and unlimited title.

It seems to us that the terms of the first act are so plain that they are not subject to any but the plainest construction.

In Leavenworth R. R. *vs.* United States, 92 U. S., 733, Justice Davis said:

"The meaning should neither be enlarged by ingenious reasoning nor diminished by strained construction."

In Lake Superior *vs.* Cunningham, 155 U. S., 354, Justice Brewer observed:

"It was declared in the act of Congress that the lands should be applied by the State to no other purpose. Even if there had been no such express declaration, *such* a *limitation* would be *implied* from the declaration of Congress that it was *granted for the given purpose.*"

The effect of this construction by the Court of Appeals is to eliminate these words from the act of Congress, and the same construction would defeat the effect of many town-site acts, acts granting lands to aid in the construction of railroads, or for educational or other purposes.

The court speaks of this as an "unusual entry." We think it was a remarkable entry. The mayor might, if he possessed the necessary qualifications as to citizenship, etc., as an individual, acquire lands of the United States under the pre-emption, homestead, and timber-culture statutes, but as mayor he had no authority to purchase any such lands.

The purpose, we may say the controlling and only pur-

pose of the act, was to qualify the mayor, as mayor, to enter and acquire title to these lands for a specific purpose.

The qualification was to the mayor and not to the city. In such cases the act is to be so construed as to limit the qualification in the manner and to the person intended.

"The grant of the sovereign confers upon the donee capacity to take according to the purpose and extent intended, no more and no less." Goodell *vs.* Jackson, 20 Johns., 693.

"And the legislative will is not to be frustrated by the application of technical rules which apply to and govern private grants."

Rutherford *vs.* Green, 2 Wheat., 196.

"The title was intended to be vested in the office perpetually, not in the man."

Smith *vs.* Pipe, 3 Colorado, 196.

II.

The Court of Appeals say, as to the act of 1890, that "the provision of this later act as to the use to which the land might be put is inoperative."

The purpose of the later act was, first, to correct a mistaken description of part of the land entered, though not the land in controversy, and, second, to authorize a substantial alteration in the use to which the land might be put. It was originally part of the public domain and was intended to be retained perpetually for public use.

This was a plain legislative interpretation of the meaning and purpose of the first act.

This ruling of the Court of Appeals on the second review nullified the controlling feature of the second act; but the construction contended for by the defendants in error in this case would defeat, and the decision of the Court of Appeals practically nullifies, both acts of Congress in their most essential feature.

The Court of Appeals say in the second opinion that the second act confirms the patent. This is true; but it should be decisive of this case that the patent and the act authorizing the patent conveyed the land to the mayor and not to the city.

The first act provided "that the mayor of the city of Denver, Colorado Territory, be and he is hereby authorized to enter, through the proper land office, at the minimum price per acre, the following lands * * * to be held and used as a burial place for the said city and vicinity."

The patent conveyed the land "unto the said Bates, mayor, in trust for said city, and to his successors, to have and to hold * * * unto said Bates, mayor, in trust for the city of Denver, and to his successors and assigns forever."

The second act confirmed this conveyance to the mayor and his successors in precise terms, providing:

"SEC. II. That the United States patent issued November 15, 1873, conveying (here follows description) to Joseph E. Bates, mayor of the city of Denver, and to his successors and assigns forever, be and the same is hereby approved and confirmed."

There is no room for interpretation or construction. There is no authority for nor any conveyance to the city, as a municipal corporation, and the title was thus conveyed to and confirmed in the mayor and not in the city or its assigns.

We observe both the spirit and the letter of the acts of Congress, by holding that the title is still in the mayor, and that he and he alone can maintain ejectment.

III.

Why was the land to be conveyed to the mayor and not to the city—and why in trust? It would be no wild conjecture to say the purpose of Congress was twofold:

First. That there should always be an officer to hold the legal title, independent of any charter provisions affecting the capacity of the city to take and hold this land.

The charter of the city was adopted by the territorial legislature and was, of course, subject to amendment or repeal. The constitution of Colorado, adopted in 1876, continued all such municipal corporations with special charters, reserving the right to the legislature to amend or repeal them at any time.

The people of the city of Denver always had the right to surrender their charter and to reincorporate under the general laws of the Territory or State. In either case serious questions might arise as to the power or capacity of the city to hold this land, and Congress might well be said to have intended complete immunity from all legislative changes in the charter or general laws, or any lack of corporate power in the city to administer a trust of this character.

Second. Congress might well be supposed to have intended this title to be exempt from barter and sale, and thus safeguarded against either the incapacity, imprudence, or corruptness of any city council.

If the sale in this instance is sustained, and the power of the city to convey a small portion of this land is upheld, it is easy to foresee it is only a question of time when other parcels will be offered and sold; and it requires no great knowledge of municipal affairs to predict that the sale will be of small advantage to the city and of great advantage to the purchaser or purchasers, and the whole tract of land

may ultimately be diverted from the purposes intended by Congress.

It will be neither a cemetery nor a public park, and the title of the bill might well have been a bill for "An act to enable the city of Denver to acquire and dispose of certain lands at the pleasure of the city council."

IV.

In order to sustain its position, the court of appeals decided that the trust was a passive one, and that the statute of uses of the Territory of Colorado operated upon this title, and transferred it from the mayor to the city of Denver.

We do not think it is possible for any State legislature to control or in any manner to alter, abridge, or enlarge the effect of an act of Congress.

Whatever title was authorized and conveyed by the first act vested, *eo instanti*, upon the passage of the act and the delivery of the patent.

The nature of the title to be acquired could only be specified by Congress, and the legislature of the Territory of Colorado was impotent, either by its enactments in the charter of the city of Denver or in its statute of uses, in any manner to affect this grant or purchase.

And yet under the decision of the circuit court of appeals the act of the sovereign law-making power of the nation was controlled by the legislative act of one of its own creatures, the territorial assembly of Colorado.

In some townsite cases the acts of Congress confer upon the legislatures the power to legislate as to the manner of administering the trust; but, unless the power is so conferred, State legislation can neither reach nor affect the subject-matter of the national grant.

The Colorado legislature could no more transfer this title from the mayor to the city than it could originally create or qualify the title.

Counsel for defendants in error, commencing on page 48 of their brief, cite numerous cases, most of which are based upon the case of Slegel *vs.* Lauer, 148 Pennsylvania, 236. In all of these cases, including Van Ness *vs.* City of Washington, 4 Peters, 232, from which counsel quoted voluminously, we would apply the language used in Stuart *vs.* Easton, 170 U. S., page 395:

"It is apparent in all the cases cited that the purposes for which grants were made were really all the purposes for which the grantees could lawfully hold real estate."

It is apparent, therefore, that counsel have, even upon their own theory, misapprehended the case presented to this court. Under the provisions of the charter of the city of Denver, the city was empowered to hold real estate for a number of purposes, one of which being for cemetery purposes, and Congress, in granting the real estate in controversy to the mayor of the city of Denver, prescribed as a condition of the grant that the property should have relation to one specific power of the city of Denver, namely, that of holding lands for cemetery purposes.

V.

In the second opinion, 45 C. C. A., 452, the Court of Appeals, refusing to reconsider the law as announced on the former review, reversed the ruling of the trial court as to admission of the deed from the city to Bishop Machebeauff, and also the deeds of Bishop Machebeauff and his association to Mr. Morgan (pages 39, 40).

The objection that the city had no power or authority to authorize this conveyance includes the proposition that the city had no title to convey. The Court of Appeals reversed this holding, deciding substantially that the city did have the title; that the variance between the report of the committee, which recommended a conveyance to the bishop and

his successors, and the deed which transferred the title to Bishop Machebeauff, his heirs and assigns, was immaterial.

The court was compelled to overrule the first and second objections upon the authority of the Court of Appeals, involving upon the second trial the fundamental error because of which we have invoked the jurisdiction of this court.

VI.

With regard to the estoppel alleged in the answer, it is sufficient to say that under the laws of the Territory and State, and under the constitution of the State of Colorado, cemeteries are exempt from taxation.

> Article X of the constitution of Colorado, sections 4 and 5, Mills' Annotated Statutes, page 697, section 654.

Besides it was not alleged that the taxes were paid for the period of five years, so that the statute of limitations of that State could not be invoked in that behalf.

It should also be said that under the statutes of Colorado the assessment of property was not at that time made by the city of Denver, but by a county assessor, who was not at any time an officer of the city, but was elected by the people of the whole county.

> General Statutes of Colorado, 1883, pages 831, 832, sections 2852-2855.

The only function performed by the city in the matter was the levy of a certain rate per cent. of taxes upon information from the county assessor and county clerk as to the total amount of the assessable property within the city limits, without any notice that any particular tract of land in the city had or had not been valued or assessed.

> Colorado General Laws 1877, 104.

And, besides, if the city had no power to grant these lands, then no acts of the city could work an estoppel.

And, again, it is not alleged that anything done by Mr. Morgan, either in the payment of the original consideration moneys or afterwards, was done in consequence of any acts of the city, and no facts are therefore alleged to constitute an estoppel *in pais*.

VII.

It is alleged in the amended answer of Mr. Morgan that he paid these taxes in good faith. We do not impeach the good faith of any of the parties to this transaction. We say, however, that the question of title does not depend upon the question of good faith in any one, but upon the question of power, namely, the power of the mayor or the power of the city council to convey these lands, and it cannot be claimed that Mr. Morgan made his purchase *without notice* of the nature and quality of the title which he was endeavoring to acquire. He could not make out his title without invoking the act of 1872, and that act was notice to him and all purchasers as to the true nature and limited quality of the title.

VIII.

We submit to this court that the ruling of the trial court upon the first trial as to the effect of the amended answer of Mr. Morgan was right, and, as it contains a complete statement of the attitude of that court on both trials, we take the liberty of inserting it here in full:

"Judge Hallet, in ruling upon the demurrer, delivered the following opinion:

"'No. 2854, Platt Rogers, mayor of the city of Denver, against Charles B. Wood and others, is an action of ejectment. Plaintiff's title is a patent from the United States, bearing date November 15th, 1873, issued under the act of Congress, approved May 21st, 1872, 17 Statutes at Large, page

140, which authorized the mayor of the city of Denver, in Colorado Territory, to enter certain tracts of land described in the act, to be held and used for a burial place for said city and vicinity. In the patent which was granted to Joseph E. Bates, then mayor of the city of Denver, the language used is that it is granted to him in trust for the city of Denver, according to the provisions of the act of Congress of the twenty-fourth day of April, 1820, entitled "An act making further provisions for the sale of the public lands." This recital of the act under which the patent was issued is clearly a mistake.

"'The act of 1820 was never extended to the Territory of Colorado, and, therefore, no grant could be made by any officer of the Government pursuant to its terms. It is a well-established rule that a patent for land must be authorized by some act of Congress, otherwise it will be void, and if this patent should be referred to the act of 1820 as the authority upon which it was issued, it would be void in conformity with that rule.

"'We are, therefore, not authorized to say that it is founded upon that act, and looking for another act upon which it may rest, we come to the act to which I have referred, of May 21, 1872, which authorized the mayor of the city to take these lands, in the words of the act, "to be held and used for a burial place for the said city and vicinity." I have no doubt that these words of the act are to be taken and read in connection with the patent, and the patent is of the same force and effect as if the language of the act had been inserted in it. The words, "in trust for the city of Denver," must be taken to mean in trust for the purposes expressed in the act of May 21, 1872; that is to say, to be held and used for a burial place for said city and vicinity. And land granted in this manner for a special purpose is to be held by the grantee, who has only the naked title inalienable in his hands. The mayor has no power to make a deed of these lands to any one. He could only hold them for the purposes expressed in the act, and the city was equally impotent. No authority was vested in any one to make any conveyance whatever of these lands. Therefore, the several answers in which the defendants in the suit set up title under a deed from the city of Denver, the date of which I do not now recall, but which was a deed to Joseph P. Machebeuf, the

bishop of Colorado, are insufficient. No one, neither the mayor of the city nor the city itself, nor the legislature of the State, nor any other authority, could grant these lands for any purpose whatsoever without the consent of the General Government; and, inasmuch as the city authorities could make no grant of the lands, no act of theirs could work an estoppel to the city in respect to them. Where one has no capacity to grant directly, he cannot, by conduct, create an estoppel which will have the effect to convey the title. An estoppel cannot work the result of conveying the title if the person to be estopped never had title which he could grant. There was no right in the city nor in the mayor to grant these lands, and therefore nothing that they could do, not all the acts alleged in the answers, can be an estoppel which will have the effect to transfer the title to the persons claiming the benefit of the estoppel and for the same reason the deed which was executed by the city is not color of title in the sense of the law which upon payment of taxes by the occupants of the lots could give title to them. The deed being void from the beginning and of no force whatever, is not color of title within the meaning of the statute. So also the lands, under the constitution of the State and under the statute of the State, were exempt from taxation. The statute provides and the constitution provides that lands held for purposes of burial are not subject to taxation. Therefore, no one by paying taxes could acquire title in the lands. The statute does not run in respect to such lands.

"'There must be a right on the part of the Government to levy taxes before the payment of such taxes can inure to the benefit of the party paying them.

"'These are briefly the views I take of the question raised by the several demurrers to the several answers of the defendants, and the several demurrers will be sustained.'"

IX.

In conclusion, the money consideration for the conveyance authorized by the act of 1872 was nominal. The real consideration was the public benefit. This land had always been part of the public domain. Previous to the passage of that act it had been occupied by various societies—the He-

brews, the Catholics, the Grand Army of the Republic, the Masons, the Odd Fellows, and the city—each controlling separate portions of it for the use of their own members and citizens, but without any title whatever, and having the interest of squatters only.

Congress intended by the passage of these two acts that this land should retain, *sub modo*, its public character, and be perpetually used for public purposes.

When for sanitary reasons the question of abandonment as a cemetery was agitated, Congress authorized such a change as would still comport with its original purpose—that of setting apart the land perpetually for the use of the people as a public park. As to any rights of occupancy by the various societies, whether Jew or Gentile, they should remain undisturbed, subject to the control incident to all municipal corporations in the exercise of the police power, but the remainder of the land should be preserved and perpetuated as a part of the heritage of the people of the city of Denver and vicinity.

The construction contended for by the plaintiff in error would restore this land to the public use originally intended by Congress.

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